



CITY OF MORGAN HILL

AGENDA ITEM
NO. 4

MEMORANDUM

To: PLANNING COMMISSION

Date: December 12, 2006

From: COMMUNITY DEVELOPMENT DEPARTMENT

Subject: DEVELOPMENT AGREEMENT, DA-06-06: MONTEREY - GUNTER

REQUEST

The applicant is requesting approval of a development agreement for a 15-unit mixed use residential development.

RECOMMENDATION

Application, DA-06-06: Adopt resolution recommending approval of development agreement

Processing Deadline: April 18, 2007

BACKGROUND/PROJECT DESCRIPTION

The project was awarded 15 allotments through the Small Vertical Mixed Use Category of the RDSCS: four for FY 2006-07, one for FY 2008-09, and 10 for FY 2009-10. The applicant proposes to build a 15-unit mixed use residential development on an approximate one acre site located between Monterey Rd and McLaughlin Ave, approximately 100 ft north of E. Main Ave. The project will be constructed in two phases. The first phase will include an approximate 27,500-sf, three-story building consisting of retail and office uses on the bottom floor and four residential units on the second and third floors. The applicant received Architectural and Site Plan approval for the Phase 1 building in November 2005. The second phase of the project will include the expansion of the three-story building for the remaining 11 residential units and construction of parking garages.

CASE ANALYSIS

The applicant is requesting approval of the project development agreement. Project development agreements are required as a formal contract between the developer and the City. The development agreement formalizes the commitments made during the Measure C process and establishes the 'commence construction' deadline for the project. The project specific commitments are identified in Paragraph 14 of the development agreement and the 'commence construction' deadline is contained in Exhibit B. In accordance with Planning Commission Policy PCP-06-01, the remaining development deadlines will be approved separately by Commission Resolution.

RECOMMENDATION

Staff recommends adoption of the attached resolution, recommending Council approval of the development agreement.

Attachments:

1. Approval Resolution (development agreement)
2. Measure C Application Site Plan and Building Elevations

RESOLUTION NO. 06- (development agreement)

**A RESOLUTION OF THE PLANNING COMMISSION
OF THE CITY OF MORGAN HILL RECOMMENDING
APPROVAL OF DEVELOPMENT AGREEMENT
APPLICATION DA-06-06: MONTEREY - GUNTER
FOR APPLICATION MC-05-03: MONTEREY -
GUNTER (APN 726-23-008)**

WHEREAS, the City Council of the City of Morgan Hill has adopted Resolution No. 4028, establishing a procedure for processing Development Agreements for projects receiving allotments through the Residential Development Control System, Title 18, Chapter 18.78 of the Morgan Hill Municipal Code; and

WHEREAS, Sections 65864 through 65869.5 of the California Government Code authorizes the City of Morgan Hill to enter into binding Development Agreements with persons having legal or equitable interests in real property for the development of such property; and

WHEREAS, the Planning Commission, pursuant to Chapter 18.78.125 of the Morgan Hill Municipal Code, awarded 15 building allotments for application MC-05-03: Monterey - Gunter; and

WHEREAS, said development agreement request was considered by the Planning Commission at their regular meeting of December 12, 2006, at which time the Planning Commission recommended approval of development agreement application, DA-06-06: Monterey - Gunter.

**NOW, THEREFORE, THE MORGAN HILL PLANNING COMMISSION DOES
RESOLVE AS FOLLOWS:**

SECTION 1. ADOPTION OF DEVELOPMENT AGREEMENT. The Planning Commission hereby recommends to the City Council, adoption of the Development Agreement for MC-05-03: Monterey - Gunter attached to this Resolution as Exhibit A.

**PASSED AND ADOPTED THIS 12TH DAY OF DECEMBER 2006, AT A REGULAR
MEETING OF THE PLANNING COMMISSION BY THE FOLLOWING VOTE:**

AYES: COMMISSIONERS:

NOES: COMMISSIONERS:

ABSTAIN: COMMISSIONERS:

ABSENT: COMMISSIONERS:

ATTEST:

APPROVED:

FRANCES O. SMITH, Deputy City Clerk

ROBERT J. BENICH, Chair

EXHIBIT A

RECORD AT NO FEE PURSUANT TO GOVERNMENT CODE SECTION 6103

Recorded at the request of
and when recorded mail to:

City of Morgan Hill
Community Development Department
17555 Peak Avenue
Morgan Hill, CA 95037

RESIDENTIAL DEVELOPMENT AGREEMENT

This Agreement entered into this _____ day of _____ 2006, by and between **Gunter Building, LLC**, under the Agreement, ("Property Owner") and the CITY OF MORGAN HILL, a municipal corporation organized and existing under the laws of the State of California (the "City").

RECITALS

This Agreement predicated upon the following facts:

A. Government Code Sections 65864-65869.5 authorize the City of Morgan Hill to enter into binding development agreements with persons having legal or equitable interests in real property for the development of such property;

B. Under Section 65865, the City of Morgan Hill has adopted rules and regulations establishing procedures and requirements for consideration of Development Agreements as contained in Title 18, Chapter 18.80 of the City of Morgan Hill Municipal Code;

C. The parties hereto desire to enter into a Development Agreement and proceedings have been taken in accordance with the City's rules and regulations;

D. The City of Morgan Hill has found that the Development Agreement is consistent with the General Plan and commitments made through the Residential Development Control System of the City of Morgan Hill (Title 18, Chapter 18.78 of the Municipal Code);

E. In light of the substantial commitments required to be made by Property Owner and in exchange for the consideration to be provided to the City by Property Owner as set forth herein, the City desires to give Property Owner assurance that Property Owner can proceed with the project subject to the existing official policies, rules and regulations for the term of this Development Agreement;

F. On _____, 2007, the City Council of the City of Morgan Hill adopted Ordinance No. _____, New Series approving the Development Agreement with the Property Owner, and the Ordinance thereafter took effect on _____, 2007.

NOW, THEREFORE, the parties agree:

1. Definitions. In this Agreement, unless the context otherwise requires:
 - (a) "City" is the City of Morgan Hill.
 - (b) "Project" is that portion of the development awarded building allotments as part of the Residential Development Control System by the City of Morgan Hill.
 - (c) "Property Owner" means the party having a legal or equitable interest in the real property as described in paragraph 3 below and includes the Property Owner's successor in interest.
 - (d) "Real Property" is the real property referred to in Paragraph 3 below.
2. Exhibits. The following documents are referred to in this Agreement, attached and made a part by this reference:

Exhibit "A"	-	Development Allotment Evaluation
Exhibit "B"	-	Development Review and Approval Schedule
Exhibit "C"	-	Legal Description of Real Property
- In the event there is any conflict between this Development Agreement and any of the Exhibits referred to above, this Development Agreement shall be controlling and superseding.
3. Description of Real Property. The real property which is subject to this Agreement is described in Exhibit "C".
4. Interest of Property Owner. Property Owner represents that he has a legal or equitable interest in the real property.
5. Assignment. The right of the Property Owner under this agreement may not be transferred or assigned unless the written consent of the City is first obtained which consent shall not be unreasonably withheld. The Property Owner shall provide the City with names, address, and phone numbers of the party to whom the property is to be transferred and Property Owner shall arrange an introductory meeting between the new owner, or his agent, and City Staff to facilitate consent of the City.
6. Recordation of Development Agreement. No later than ten (10) days after the City enters into this Agreement, the Clerk of the City shall record an executed copy of this Agreement in the Official Records of the County of Santa Clara. The burdens of this Agreement shall be binding upon, and the benefits of this Agreement shall inure to, successors in interest to the parties to this Agreement; provided, however, that this Agreement shall not be binding upon any consumer, purchaser, transferee, devisee, assignee or any other successor of Property Owner acquiring a completed residential unit comprising all or part of the Project.

7. Relationship of Parties. Property Owner and the City agree that each is not the agent of the other for purposes of this Agreement or the performance hereunder, and Property Owner is an independent contractor of the City.

8. City's Approval Proceedings for Project. On February 14, 2006, the City of Morgan Hill approved a development plan for the real property as part of its Residential Control System Review. This approval is described in proceedings designated File No. MC-05-03: Monterey - Gunter, on file in the office of Community Development to which reference is made for further particulars. The development plan provides for the development of the property as follows:

Construction of a 15-unit residential mixed use development as approved by the City of Morgan Hill Planning Commission.

9. Changes in Project.

(a) No substantial change, modification, revision or alteration may be made in the approved development plan without review and approval by those agencies of the City approving the plan in the first instance, which approval shall not be unreasonably withheld. No minor changes may be made in the approved development plan without review and approval by the Director of Community Development of the City, or similar representation if the Director is absent or the position is terminated, which approval shall not be unreasonably withheld.

(b) Any change specified herein and approved by this Development Agreement shall be deemed to be an allowable and approved modification to the Development Plan.

(c) In the event an application to change, modify, revise or alter, the development plan is presented to the Director of Community Development or applicable agencies of the City for review and approval, the schedule provided in Exhibit "B" shall be extended for a reasonable period of time as agreed to by the parties hereto to accommodate the review and approval process for such application.

(d) In the event the developer is unable to secure construction liability insurance because the project contains attached dwellings, the developer may convert the attached units into zero lot line or reduced setback detached units, subject to the review and approval of the Architectural Review Board. A zero lot line or reduced setback detached unit is defined as a dwelling physically separated from an adjacent dwelling on a separate lot of record but architecturally connected by a design element to give the appearance of attachment. In order to qualify for zero lot line or reduced setback detached units, evidence shall be provided to the City that the developer is unable to obtain construction liability insurance due specifically to the attached dwellings. This provision is contingent upon City Council approval of amendments to Title 18 of the Morgan Hill Municipal Code (the Zoning Code) to allow zero lot line or reduced setback detached units.

10. Time for Construction and Completion of Project.

(a) Securing Building Permits and Beginning Construction. Unless excused

from performance as provided in paragraph 27 hereof, Property Owner agrees to secure building permits by (see Exhibit "B") and to begin construction of the Project in accordance with the time requirements set forth in the Uniform Building Code and the City's Residential Development Control System (see Exhibit "B") as these exist on the date of execution of this Agreement. In the event Property Owner fails to comply with the above permit issuance and beginning construction dates, and satisfactory progress towards completion of the project in accordance with the Residential Development Control System, the City, after holding a properly noticed hearing, may rescind all or part of the allotments awarded to the Property Owner and award said allotments to the next Residential Development Control System applicant who has qualified for such allotments.

(b) Progress Reports Until Construction of Project is Complete. Property Owner shall make reports to the progress of construction in such detail and at such time as the Community Development Director of the City of Morgan Hill reasonably requests.

(c) City of Morgan Hill to Receive Construction Contract Documents. If the City reasonably requests copies of off-site and landscaping contracts or documents for purpose of determining the amount of any bond to secure performance under said contracts, Property Owner agrees to furnish such documents to the City and the City agrees to maintain the confidentiality of such documents and not disclose the nature or extent of such documents to any person or entity in conformance with the requirements of the California Public Records Act.

(d) Certificate of Completion. Within thirty (30) days after completion to the City's satisfaction of 25% of the total number of units, the City shall provide Property Owners with an instrument in recordable form certifying completion of that portion of the project. Within thirty (30) days after completion to the City's satisfaction of 50% of the total number of units, the City shall provide Property Owners with an instrument in recordable form certifying completion of that portion of the project. Within thirty (30) days after completion to the City's satisfaction of 75% of the total number of units, and after all public and private improvements have been completed to the City's satisfaction, the City shall provide Property Owners with an instrument in recordable form certifying completion of that portion of the project. Within thirty (30) days after completion to the City's satisfaction of 100% of the total number of units, the City shall provide Property Owners with an instrument in recordable form certifying completion of the entire project. Upon issuance of the certificate of completion for 100% of the total units, this Development Agreement shall be deemed terminated as to the entire project.

11. Hold Harmless. Property Owner agrees to defend and hold the City and its officers, agents, employees and representatives harmless from liability for damage or claims for damage for personal injury including death or claims for property damage which may arise as a result of the construction of the project by the Property Owner or his contractor, subcontractor, agent, employee or other person acting within the course and scope of the authority of Property Owner.

Property Owner further agrees to hold the City and its officers, agents, employees, and representatives harmless from liability for damages or claims for damages suffered or alleged to have been suffered as a result of the preparation, supply, and/or approval of the plans and specifications for the project by the City or its officers, agents, employees or representatives.

Nothing herein shall require or obligate Property Owner to defend or hold the City and/or its officers, agents, employees and representatives harmless from or against any damages, claims, injuries, death or liability resulting from negligent or fraudulent acts of the City or its officers, agents, employees or representatives.

12. Insurance. Property Owner shall not commence actual construction under this Agreement until Property Owner has obtained insurance as described herein and received the approval of the City Attorney of Morgan Hill as to form and carrier, which approval shall not be unreasonably withheld. Property Owner agrees to maintain such insurance from a date beginning with the actual commencement of construction of the Project and ending with the termination of the Agreement as defined in Paragraph 20.

(a) Compensation Insurance. Property Owner shall maintain Worker's Compensation Insurance for all persons employed by Property Owner at the site of the Project, not including the contractor and or subcontractors on the site. Property Owner shall require each contractor and subcontractor similarly to provide Worker's Compensation Insurance for themselves and their respective employees. Property Owner agrees to indemnify the City for damage resulting from its failure to obtain and maintain such insurance and/or to require each contractor or subcontractor to provide such insurance as stated herein.

(b) Public Liability and Property Damage Insurance. Property Owner agrees to carry and maintain public liability insurance against claims for bodily injury, death or property damage to afford protection in the combined single limit of not less than One Million Dollars (\$1,000,000).

(c) Additional Insured. Property Owner shall obtain an additional insured endorsement to the Property Owner's public liability and property damage insurance policy naming the City, its elective and appointive boards, commissions, agents, and employees, as additional insured.

13. Cancellation of Insurance. On or before the commencement of actual construction of the Project, Property Owner shall furnish the City satisfactory evidence that the insurance carrier selected by the Property Owner and approved by the City will give the City of Morgan Hill at least ten (10) days prior written notice of cancellation or reduction in coverage of a policy.

14. Specific Restrictions on Development of Real Property. Notwithstanding the provisions of land use regulations otherwise applicable to the real property by virtue of its land use designation of Mixed Use and zoning classification of CC-R, Central Commercial - Residential, the following specific conditions of the Residential Development Control System building allotment approval govern the use of the property and control over provisions in conflict with them, whether lots are developed by the Property Owner or by subsequent property owners:

(a) Permitted uses of the property are limited to the following:

The Tentative map, Grading Plans and Precise Residential Development Plans as approved by the City of Morgan Hill Planning Commission and Site and Architectural Review Process.

- (b) Maximum density (intensity of use) is:

That shown on the Vesting Tentative map and Grading Plans and Precise Residential Development Plans as approved by the City of Morgan Hill Planning Commission and Site and Architectural Review Process.

- (c) Maximum height for each proposed building is:

That height shown on the Architectural plans as approved by the City of Morgan Hill under Site and Architectural Review Process.

- (d) Landscaping and recreational amenities, as shown on Site, Architectural, Landscape and Grading Plans as approved by the City of Morgan Hill Planning Commission and Site and Architectural Review Process.

- (e) All public improvements shall be installed by the Property Owner along property frontages to the satisfaction of the Public Works Department consistent with the Site, Architectural, Landscape and Grading Plans as approved by the City of Morgan Hill Planning Commission and Site and Architectural Review Process.

- (f) All architectural features and materials for all structures shall be constructed as shown on the Architectural plans as approved by the Site and Architectural Review Process.

- (g) Property Owner agrees to any other reasonable condition of approval resulting from subdivision, site review and environmental review, which conditions are on file with the City.

- (h) Property Owner agrees to include the following School features in the development:

(i) Property Owner agrees to pay the district-adopted developer fees as provided by the Leroy F. Greene School Facilities Act of 1998.

(ii) Project will provide an on-site community room specifically designed for after school educational programs for use by the MHUSD at no cost. Future points may be withheld or payment of such costs charged to the developer if obligation is not met.

- (i) Property Owner agrees to include the following Open Space improvements in the development:

(i) All parks and open space within the project will be maintained by a neighborhood homeowners association.

(ii) Gunter Brothers History Brass Plaque will be installed along Monterey Road. Old pictures of Gunter Brothers Granary and Weigh

Station will be hung in the lobby. Original bricks to be used in the new construction of brass plaque monument.

(iii) Project has committed to pay double the per unit Downtown Open Space Amenity fee in an amount equal to the most recent adjusted open space fee. The amount of the open space fee shall be based on the average cost per dwelling unit for an equivalent Transferable Development Credit (TDC), and will be collected on a per unit basis at the time of the issuance of a building permit. The current open space rate is \$36,880 per TDC which equals \$1,475.20 per unit (based upon the cumulative project to date ratio of one TDC for every twenty-five dwelling units proposed.) With the double per unit fee commitment, the cost per unit would be \$2,950.40 based on the current open space rate of \$36,880. The open space fee shall be adjusted annually in accordance with the annual percentage increase or decrease in the median price of a single-family detached home in Santa Clara County. The base year from which the annual percentage change is determined shall be January 1, 2005.

(j) the development: Property Owner agrees to include the following **Public Facility** features in

(i) The project shall meet all standard requirements for design and construction of public facilities.

(ii) Project storm drain lines that are to be maintained by the city will be constructed entirely within the paved area of the street (curb to curb), or in a location acceptable to the Director of Public Works.

(iii) The project drainage shall be consistent with the City's storm drain system.

(iv) Applicant shall insure post run-off does not exceed pre-run-off.

(v) Applicant will provide the following public facility improvement in excess of standard requirements: Install McLaughlin Avenue to full street standards from E. Main Avenue to the project's northerly boundary. Off-site cost estimated to be \$8,535/unit. Applicant reserves the right to standard reimbursement agreements. Reimbursements shall only be considered if construction costs exceed \$6,600 per unit.

(k) The Property Owner agrees to provide the following **Park and Recreation** improvements:

(i) Each project phase shall provide the following recreational amenities within the proposed development:

Phase I (4 units; FY 2006-07): none

Phase II (1 unit; FY 2008-09): none

Phase II (1 unit; FY 2008-09): none

Phase III (10 units; FY 2009-10): exercise room, fountain, shaded area and benches

(ii) Project will provide a continuous and unrestricted mid block pedestrian connection from Monterey Road to McLaughlin Avenue through the buildings.

(iii) In addition to payment of standard park fees, the applicant will pay the lesser of double the required in lieu park fees or \$2,200 per unit.

(l) Property Owner agrees to include the following **Housing Types & Housing Needs** in the development:

(i) All 15 units shall be condominiums affordable to less than moderate income households. The final sales price (at close of escrow) for the less than moderate rate units will be based on HUD income limits for a family of 4 at the closing date.

(ii) The project shall provide the following minimum bedroom count mix:

- Two, One-bedroom units
- Two, Two-bedroom units
- Two, Three-bedroom units

(iii) Minimum Interior standard finishes will be as follows:

- All closets shall have doors
- Interior doors to be raised panel type or same as market rate
- Door hardware to be brass finish or the equivalent
- Appliances shall be major brand name
- Microwave with exhaust vent shall be installed over range.
- Kitchen counters shall be white ceramic tile
- Kitchen cabinets shall be stained wood or of an exterior finish of comparable quality with white melamine interiors
- Units will be roughed in for AC including electrical and line set.
- Basic alarm system to secure all accessible openings to home
- Carpet in bedrooms, hallways, family rooms
- Linoleum or tile in entry, bathrooms kitchens
- Laminate flooring may be substituted for carpet or linoleum
- Electric garage door opener

(m) Property Owner agrees to include the following **Quality of Construction** features in the development:

(i) All homes will have EPA "Energy Star" labeled windows with low-e coatings and vinyl or metal frames.

- (ii) Installation of a high efficiency gas furnace of 90 percent efficiency rating or greater in all dwelling units.
- (iii) Installation of air conditioning units with high efficiency condensing unit with a SEER rating of 12 or higher. Must be installed in more than 60 percent of the dwelling units in the project.
- (iv) Solar hot water system
- (v) Recirculating hot water system with demand pumping.
- (vi) Installation of cast-iron drainage pipe and piping insulation between floors for sound reduction of plumbing.
- (vii) Installation of future ready wiring concepts such as home running phone lines from all habitable rooms directly to main phone box rather than looping using RJ6 for television/video and high speed computer access, and CAT5R or equivalent for telephone lines.
- (viii) Class A roof covering
- (ix) One and one-eighth inch (1 1/8") glued and screwed sub-floors and insulation of interior walls for sound
- (x) Additional layer of 1/2" Gypsum Board over 5/8" reinforced fiberglass channels at 24" o.c. at all walls and ceilings between each unit and common hallway.
- (xi) One and one-half inch (1 1/2") Gypcrete Flooring over TJI floor joists.
- (xii) Use porches or balconies for any area viewed from the public right of way or multi-unit courtyards interior to the project on at least 25% of units to promote a neighborhood feel.
- (xiii) Use at least two different roof lines and two different pitches throughout the project.
- (xiv) Use architecture and profiles and massing that conform and work with the existing surrounding neighborhoods.
- (xv) Project will provide a consistent level of architectural relief and detailing on all four building elevations.
- (xvi) Project will provide at least three base colors and three trim colors on the single building.
- (xvii) Locates garages at rear of building at a location not visible from public right-of-way.
- (xviii) AC units on roof (within roof well) to reduce noise.

(n) The Property Owner agrees to provide the following **Circulation** improvements:

- (i) The project will install the following pedestrian improvements beyond the project frontage: Applicant agrees to fix broken sidewalks on E. Main Avenue between Depot Street and Monterey Road.
- (ii) The project will install bicycle parking with secured bicycle racks at the park and ride at Main and Hale Avenues and at Monterey Road and Main Avenue near the bus stop.

(o) The Property Owner agrees to provide the following **Safety and Security** improvements:

- (i) Provides fire escape ladders for upper floor bedrooms and one mounted fire extinguisher (rated 2A10BC) for up to the first 1,500 square feet of floor space, and one additional extinguisher for each additional 1,500 square feet of floor space or fraction thereof.
- (ii) Provides a first aid kit with a poison control document to be installed in the kitchen area of the home.
- (iii) Install fire alarms in all units that tie into the City's emergency response system.
- (iv) Provide outdoor lighting to meet all police department specifications.
- (v) Install illuminated address numbers for each unit and painted reflective curb numbers where possible.
- (vi) Install intrusion alarm system in all units.
- (vii) Noncombustible siding is used on 100 percent of the total units and comprises at least 50 percent of the siding of an individual unit.
- (viii) Neighborhood Emergency Preparedness Program administered through a homeowners association or central property management.
- (ix) Hardwired carbon monoxide detection device or devices with battery backups. The installation of the devices is to be located per manufacturer's requirement with at least one detector per floor of the residence.
- (x) Arranges a minimum of 75 percent of units so that entrances are visible from public right-of-way or private circulation areas.

(p) The Property Owner agrees to provide the following **Landscaping** improvements:

- (i) Twenty-four inch box-size trees from a city approved list, with a minimum height of nine feet and a spread of three to four feet. The box-size trees will be provided within the development at a ratio of one box-size tree per ten trees provided with the landscape area to be installed by the developer. The one box size tree per ten trees calculation does not include street trees.
- (ii) Varied front yard landscaping will be installed along project frontage by the developer.

(iii) Deciduous trees will be planted along the south facing side of homes or buildings.

(iv) All street trees are twenty-four inch box trees from the city approved list.

(v) Project provides street trees consistent with the Street Tree Master Plan that addresses tree selection, location of trees on each lot, proper tree spacing, and preservation of any existing trees.

(vi) Drought tolerant grasses are used for lawn areas and no more than twenty-five percent of the landscape area is covered with lawn. The twenty-five percent lawn coverage calculation is exclusive of landscape area within parks.

(vii) Automatic irrigation systems utilize separate valves and circuits for trees; shrubs and ground covers; and lawn areas. Minimum of three separate valves required. A separate valve shall be provided for the following areas: front lawn, rear lawn, and for trees, shrubs and groundcover (combined) where viable. If trees, shrubs, and groundcover cannot be combined under one valve, a separate valve for trees shall be provided, resulting in a minimum of four separate valves required. Water conserving irrigation system is also used within the development, i.e., drip irrigation.

(viii) The landscape to be installed by the developer will include hardscape coverage such as decorative paving, wood decking, decorative stone and similar non-irrigated areas on at least fifteen percent of the landscape area. Pedestrian walkways across circulation aisles are not included in this item.

(ix) For at least 75% of all plant material, uses water conserving plants contained on the Selected Plant List, Appendix A of the City Water Conservation Landscape Guide.

(x) Project provides a separate water source (e.g., well, import or recycled water) to irrigate common area landscape areas and front yard areas that are maintained by a homeowners association.

(xi) Landscaping shall be installed on all areas visible from public and private rights-of-way.

(q) The Property Owner agrees to provide the following **Natural and Environmental** improvements:

(i) Minimal grading is required which is considered a fill or excavation of less than two feet in depth (three feet is acceptable for

detention ponds).

- (ii) Design windows and doors to create privacy.
- (iii) Arranges buildings and access-ways and locates parking areas and open space to minimize the use of soundwalls next to streets. Setbacks are used to create buffer between streets and project, windows will be double pane, AC units provided for all units, and extra sound insulation installed on all units facing streets, VTA parking or railroad tracks.
- (iv) Dry wall is source separated and recycled.
- (v) Wood waste is source separated for recycling or composting.
- (vi) Cardboard containers and boxes are source separated and recycled.
- (vii) Uses certified Forest Stewardship Council (FSC) plywood.
- (viii) Uses building insulation with minimum 25% recycled content.
- (ix) Uses light exterior roof colors to reflect the sun's heat.
- (x) Uses low to zero emission volatile organic compounds (VOC) and adhesives

(r) The Property Owner agrees to provide the following **Livable Community** improvements:

- (i) Project will construct a bus stop at the northeast corner of Main Avenue and Monterey Road and these improvements will be accepted by the VTA for maintenance.

(s) The Property Owner shall record constructive notice on the Final Parcel Map for the development that each lot is subject to the requirements of this Development Agreement, and that commitments under the Agreement which the City has permitted the Property Owner to delay must be fulfilled by the next subsequent property owners.

(t) The project shall provide the following information, by address for each unit, to the Community Development Department:

- (i) Date of sale
- (ii) The number of bedrooms
- (iii) The final sales price

This information shall be reported on an annual basis for the calendar year and is due to the City by March 30 of the following year for every year until the project is completed and all units are sold.

15. Effect of Agreement on Land Use Regulations.

(a) Unless otherwise provided herein or by the provisions of the Residential Development Control System, the rules, regulations and official policies governing permitted uses of the real property, governing density and governing the design, improvement and construction standards and specifications applicable to development of the real property are those rules, regulations and official policies, including without limitation building code requirements, in force at the time of the execution of this Agreement.

(b) This Agreement does not prevent the City, in subsequent actions applicable to the real property, from applying new rules, regulations and policies which do not conflict with those rules, regulations and policies applicable to the real property as set forth in Paragraph 14 and in effect at the time of the execution of this Agreement. Any rules, regulations or policies enacted by the City subsequent to the execution of this Agreement which are in conflict with those rules, regulations and policies in effect at the time of the execution of this Agreement or in conflict with the terms of this Agreement shall not be applied to the Project.

(c) The City shall be entitled to impose development fees in effect at the time a vested tentative map or other equivalent map is approved, rather than those in effect as of the date of this Agreement. The City shall be entitled to apply building standards in effect at the time the building permits are actually issued, rather than those in effect as of the date of this Agreement.

(d) This Agreement does not prevent the City from denying or conditionally approving any subsequent development project application on the basis of such existing or new rules, regulations and policies.

(e) Nothing contained herein will give Property Owner a vested right to develop the described Project or to obtain a sewer connection for said Project in the absence of sewer capacity available to the Project.

16. State or Federal Law. In the event that state or federal laws, or regulation, enacted after this Agreement have been entered into, prevent or preclude compliance with one or more provisions of this Agreement, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such state or federal laws or regulations.

17. Periodic Review.

(a) The City shall review this Agreement at least at four times per year and on a schedule to assure compliance with the Residential Development Control System, at which time the Property Owner is required to demonstrate good faith compliance with the terms of this Agreement.

(b) If, as a result of such periodic review, the City finds and determines, on the basis of substantial evidence, that Property Owner has not complied in good faith with the terms or conditions of this Agreement, the City may rescind all or part of the allotments awarded to Property Owner and award said allotments to the next Residential Development Control System applicant who has qualified for such allotments.

18. Amendment or cancellation of Agreement. This Agreement may be amended, or canceled in whole or in part, by mutual consent of the parties and in the manner provided for in California Government Code Section 65868, 65867 and 65867.5.

19. Enforcement. Unless amended or canceled pursuant to Paragraph 18 hereof, this Agreement shall be enforceable by any party to it notwithstanding any change in any applicable general or specific plan, zoning, subdivision, or building regulation adopted by the City, which alters or amends the rules, regulations or policies specified in Paragraph 14 and 15.

20. Termination of Agreement. This Agreement shall terminate upon the occurrence of one or more of the following events or conditions:

(a) The City finds and determines, in accordance with the terms of Paragraph 17, that Property Owner has not reasonably complied in good faith with the terms of this Agreement and the City elects to terminate this Agreement;

(b) Property Owner gives the City written notice of its decision to terminate this Agreement;

(c) Property Owner and the City mutually consent to termination of this Agreement in accordance with the terms of Paragraph 18; or

(d) Issuance of the Certificate of Completion referred to in Paragraph 10(d), provided that this Agreement shall only terminate with respect to that part of the Project to which the Certificate of Completion applies.

21. Default by Property Owner. Property Owner shall be in default under this Agreement upon the occurrence of one or more of the following events or conditions:

(a) If a written warranty, representation or statement was made or furnished by Property Owner to the City with respect to this Agreement which was known or should have been known to be false in any material respect when it was initially made;

(b) A finding and determination by the City of Morgan Hill made following a periodic review under the procedure provided for in Government Code Section 65856.1 that upon the basis of substantial evidence, the Property Owner has not complied in good faith with one or more of the material terms or conditions of this Agreement.

22. Default by the City of Morgan Hill. The City is in default under this Agreement upon the occurrence of one or more of the following events or conditions:

(a) The City, or its boards, commissions, agencies, agents or employees, unreasonably fails or refuses to take action on proposals, applications or submittal presented by the Property Owner within a reasonable time after receipt of such proposals, applications or submittal.

(b) The City unreasonably fails or refuses to perform any obligation owed by it under this Agreement.

(c) The City imposes upon Property Owner rules, regulations or official policies governing permitted uses, density, maximum height and size of proposed structures and reservations (dedications) of land for public purposes of the Property or the design, improvement and construction standards and specifications applicable to the development of the Property, which are not the same in all material respects as those rules, regulations and official policies in effect at the time of the execution of this Development Agreement and which adversely and materially affect the Project.

23. Cure of Default.

(a) This section shall govern cure of defaults except to the extent to which it may be in conflict with the Residential Development Control System. Upon the occurrence of an event of default by either party, the party not in default (the "non-defaulting party") shall give the party in default (the "defaulting party") written notice of the default. The defaulting party shall have thirty (30) calendar days from the date of notice (subject to subsection (b) below) to cure the default if such default is curable within thirty (30) days. If such default is so cured, then the parties need not take any further action except that the defaulting party may require the non-defaulting party to give written notice that the default has been adequately cured.

(b) Should the default not be cured within thirty (30) calendar days from the date of notice, or should the default be of a nature which cannot be reasonably cured within such thirty (30) day period and the defaulting party has failed to commence within said thirty (30) day period and thereafter diligently prosecute the cure, the non-defaulting party may then take any legal or equitable action to enforce its rights under this Development Agreement.

24. Remedies.

(a) In the event Property Owner defaults under the terms of this Agreement, the City, after holding a properly noticed hearing may rescind all or part of the allotments awarded to Property Owner and award said allotments to the next Residential Development Control System applicant who has qualified for such allotments or may terminate or modify this Development Agreement.

(b) In the event the City defaults under the terms of this Agreement, in no event shall the Property Owner be entitled to any of the following:

- (i) Punitive damages;
- (ii) Damages for lost profits;
- (iii) Damages for expenditures or costs incurred to the date of this Agreement.

(c) The parties hereby explicitly acknowledge and agree that remedies for any issue or dispute arising out of the performance or non-performance of this Agreement are limited

to those provided under actions for mandamus, declaratory relief and/or specific performance. The parties further agree that in no event shall any party shall maintain any action, claim or prayer for damages pursuant to any alleged federal or state constitutional or statutory claim, or incurred as a result of an alleged breach of this Agreement.

25. Attorneys Fees and Costs. If legal action by either party is brought because of breach of this Agreement or to enforce a provision of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees and court costs.

26. Notices. All notices required or provided for under this Agreement shall be in writing and delivered in person or sent by certified mail, postage prepaid addressed as follows:

City of Morgan Hill: Community Development Department
City of Morgan Hill
17555 Peak Avenue
Morgan Hill, CA 95037

With a copy to: City Clerk
City of Morgan Hill
17555 Peak Avenue
Morgan Hill, CA 95037

Property Owner: Gunter Building LLC
c/o Craig Van Kuelen
17600 Monterey Road, Suite B
Morgan Hill, CA 95037

A party may change the address shown above by giving notice in writing to the other party and thereafter notices shall be addressed and transmitted to the new address.

27. Force Majeure. Either party hereto, acting in good faith, shall be excused from performing any obligations or undertakings provided in this Agreement in the event and for so long as the performance of any such obligation is prevented, delayed, retarded or hindered by an act of God, fire, earthquake, floods, explosion, actions of the elements, war, invasion, insurrection, riot, mob violence, strikes, lockouts, eminent domain, inability to obtain labor or materials or reasonable substitutes therefor, non City governmental restrictions, regulations or controls, including revisions to capacity ratings of the wastewater plant by the Regional Water Quality Control Board, the State Water Resources Board, or any court action or judicial orders; unreasonable delays in processing applications or obtaining approvals, consent or permits, filing of legal actions, or any other cause, not within the reasonable control of such party. Active negligence of either party, its officers, employees or agents shall not excuse performance.

28. Rules of Construction and Miscellaneous Terms.

(a) The singular includes the plural; the masculine gender includes the feminine; "shall" is mandatory; "may" is permissive.

(b) If a part of this Agreement is held to be invalid, the remainder of the Agreement is not affected.

(c) This writing contains in full, the final and exclusive Agreement between the parties.

(d) The time limits set forth in this Agreement may be extended by mutual consent of the parties.

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto on the day and year first above written.

APPROVED AS TO FORM:

CITY OF MORGAN HILL

JANET KERN
City Attorney

J. EDWARD TEWES, City Manager

Attest:

IRMA TORREZ, City Clerk

PROPERTY OWNER(S)

**(ALL SIGNATURES, EXCEPT CITY CLERK AND CITY ATTORNEY,
MUST BE ACKNOWLEDGED BY A NOTARY)**

EXHIBIT "A"

DEVELOPMENT ALLOTMENT EVALUATION

MC-05-03: Monterey - Gunter

(See Entire Documents on File in the
Community Development Department - City Hall)
CITY OF MORGAN HILL

EXHIBIT "B"

DEVELOPMENT SCHEDULE MC-05-03: MONTEREY - GUNTER
FY 2006-07 (4 allocations)/FY 2008-09 (1 allocation)/FY 2009-10 (10 allocations)

I. COMMENCE CONSTRUCTION:

FY 2006-07 (4 units)	06-30-2007
FY 2008-09 (1 unit)	06-30-2009
FY 2009-10 (10 units)	06-30-2010

Failure to commence construction by the dates listed above shall result in the loss of building allocations. In such event, the property owner must re-apply under the development allotment process outlined in Section 18.78.090 of the Municipal Code if development is still desired.

An exception to the loss of allocation may be granted by the City Council if the cause for the lack of commencement was the City's failure to grant a building permit for the project due to an emergency situation as defined in Section 18.78.140 or extended delays in environmental reviews, permit delays not the result of developer inactions, or allocation appeals processing.

If a portion of the project has been completed (physical commencement on at least 8 dwelling units and lot improvements have been installed according to the plans and specifications), the property owner may submit an application for reallocation of allotments. Distribution of new building allocations for partially completed project shall be subject to the policies and procedures in place at the time the reallocation is requested.

The development schedule for construction of the 15 units may be accelerated in accordance with the provisions of Measure F, approved by the voters in November 2006.

EXHIBIT "C"

**LEGAL DESCRIPTION
MC-05-03: Monterey - Gunter**

The land referred to herein is situated in the State of California, County of Santa Clara, City of Morgan Hill and is described as follows:

LOT 29, as delineated upon that certain Map entitled "Map of the Old Homestead Tract", filed for record in the Office of the Recorder of the County of Santa Clara, State of California, on June 16th, 1913 in Book O of Maps, at Page 39.

APN: 726-23-008
ARB: 727-9-7

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SCALE: 1" = 20'

McLAUGHLIN AVENUE

726-23-002
'A TOOL SHED'

EX 40' R/W

EX STREET PAVING

PROPOSED STREET IMPROVEMENTS

PROPOSED R/W

EXISTING R/W

EXISTING R/W

SOUND WALL

PHASE 2
GARAGE

AUTO
COURTYARD

PHASE 2
GARAGE

AUTO
COURTYARD

SOUND WALL

726-23-005
'TRAN'

726-23-009
'GOODWILL INDUSTRIES'

PHASE 2
RESIDENTIAL BUILDING

PHASE 1
COMMERCIAL BUILDING

726-23-006
'SHIMODA'

726-23-007
'POPMA'

TRASH
ENCLOSURE

9.96'

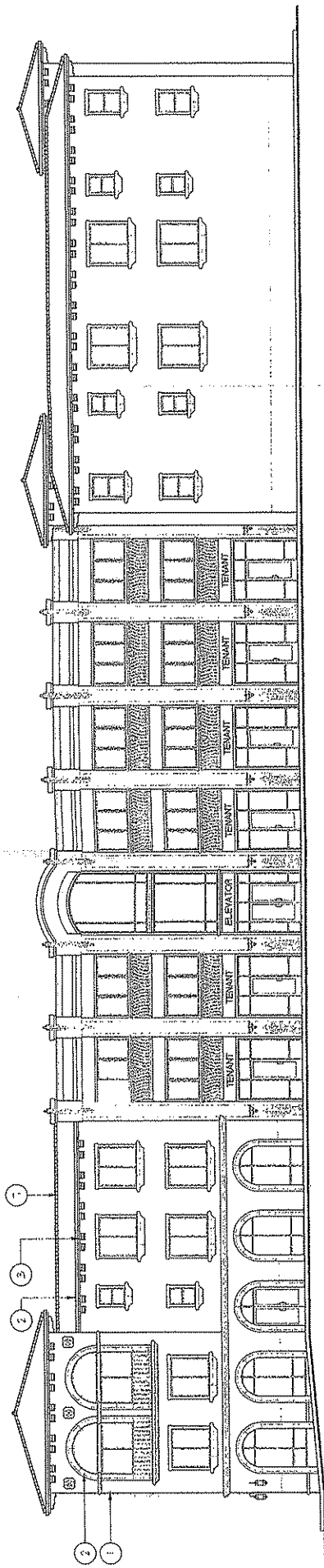
11.66'

MONTEREY
ROAD

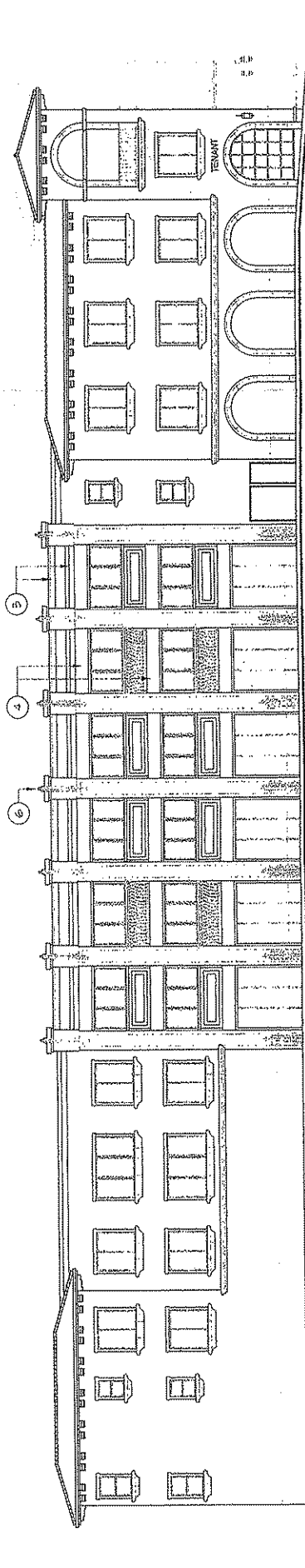
MONTEREY
ROAD

SCALE: 1" = 20'

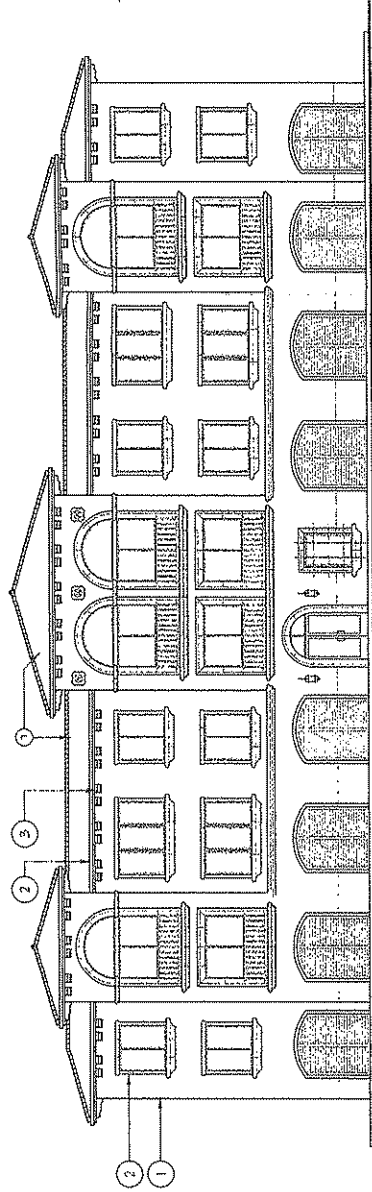
EAST MAIN AVENUE



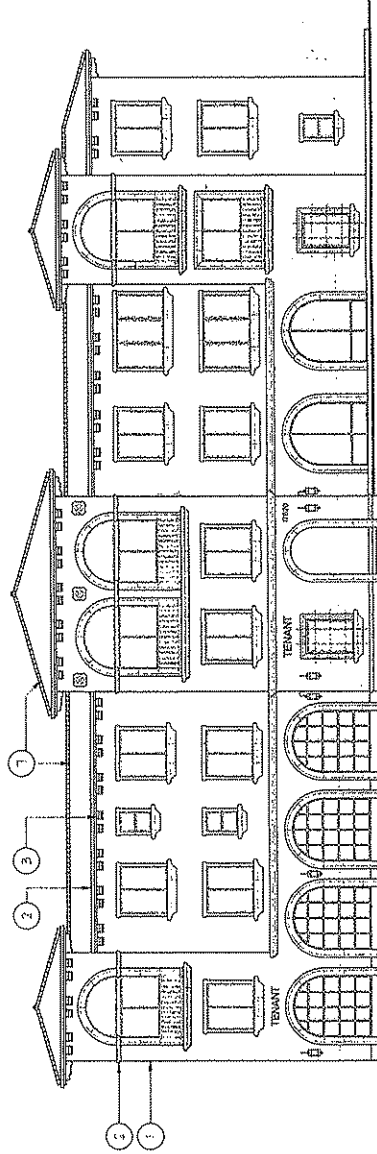
SOUTH (PARKING LOT) ELEVATION



NORTH ELEVATION



EAST ELEVATION



WEST (MONTEREY ROAD) ELEVATION

CONSTRUCTION KEYNOTES

- ① CEM. PLASTER 0/2 LAYERS TYPE 'D' BLD'G. PAPER 0/PLY.
(FINISH: 'LIGHT DASH COAT' - VERIFY W/OWNER), TYP.
FACADE A - BASE COLOR I
- ② CEM. PLASTER FINISH 0/BUILT-UP FIBERGLASS REINFORCED
FOAM TRIM, TYP.
FACADE A - TRIM COLOR I
- ③ CEM. PLASTER FINISH 0/BUILT-UP FIBERGLASS REINFORCED
FOAM TRIM, TYP.
FACADE A - TRIM COLOR II
- ④ CEM. PLASTER 0/2 LAYERS TYPE 'D' BLD'G. PAPER 0/PLY.
(FINISH: 'LIGHT DASH COAT' - VERIFY W/OWNER), TYP.
FACADE B - BASE COLOR I
- ⑤ CEM. PLASTER FINISH 0/BUILT-UP FIBERGLASS REINFORCED
FOAM TRIM, TYP.
FACADE B - TRIM COLOR I
- ⑥ CEM. PLASTER FINISH 0/BUILT-UP FIBERGLASS REINFORCED
FOAM TRIM, TYP.
FACADE B - TRIM COLOR II
- ⑦ CLASS 'A' CONCRETE 'S-TILE' ROOFING MATERIAL, EAGLE OR EQ.
SELECT BY OWNER, TYP. @ FACADE A